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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 218

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, CHAIRMAN AND STATE LEGISLATIVE REPRESENTATIVE, AND ILLINOIS COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellant's statement of the case is in some particulars inaccurate and is, in the view of appellees, in other particulars inadequate. Appellees therefore make the following additional statement:

The Brotherhood of Railroad Trainmen is an organization representing trainmen and switchmen who are employed by the Terminal Railroad Association of St. Louis, Respondent (R. 18, 60). Appellant is an association which performs terminal services in the switching district of East St. Louis, Illinois, for and on behalf of its proprietary lines and other railroad companies desiring use of its facilities (R. 151). The corporate control of the Terminal Railroad Association is vested equally in each of the following railroad companies: The Alton Railroad Company; Baltimore & Ohio Southwestern Railroad Co.; Chicago & Eastern Illinois Railway; Chicago,

Burlington & Quincy Railroad Co.; Chicago, Rock Island & Pacific Railroad Co.; Cleveland, Cincinnati, Chicago & St. Louis Railway Co.; Illinois Central Railroad Co.; Louisville & Nashville Railroad Co.; Missouri, Kansas, Texas Railroad Co.; Missouri, Pacific Railroad Co.; Missouri Pacific Acct.; St. Louis Iron Mountain & Southern Railroad Co.; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Co.; St. Louis-San Francisco Railway Co.; St. Louis Southwestern Railway Co.; Southern Railway Co.; and Wabash Railway Co.

Switchmen are assigned to particular crews. The switchmen make and break up trains in yards, switch industries, make deliveries from connections to the Terminal Railroad Association from through lines, make transfer runs from and to various yards of the Terminal Railroad Association and perform that work in the yards or industries required to make up trains and couple cars together. They see that the air brakes are coupled and in order on the train. When a train leaves the yard for a destination, the switchmen take their proper positions on the train, the rear man taking his position on the rear car of the train (R. 20). The rear man is required to ride the rear coupler of the car where overhead and side structures do not clear him on the top or side of the car (R. 20). He lines all switches back in a proper position when they have been used by his train and, in case of reverse movement, when a train is shoved, he is required to protect street and highway crossings to keep the public from being killed or injured. When shoving a train near or on private crossings, he is required to be on top of the rear car, unless prevented by overhead or side structures that do not clear the switchman (R. 20, 29).

The length of the trains in operation handled by trainmen on one trip vary from one to a hundred cars (R. 86, 99, 100, 101, 103).

A caboose or safety cab is a railroad car furnished for the housing of train crews and equipped for their safety. They are needed to avoid side and overhead structures which endanger the life and limb of the switchmen and to provide for them a safer place in case of derailment of the train or sudden jerking or sudden stops which would be likely to throw switchmen from the top, side or end of the car (R. 21). In case a train breaks in two, it is very dangerous for a man to be on the rear end of the train, as it is easy to be knocked off the top or end by a sudden jerk or stop (R. 22). It also protects the switchmen from the inclement weather in both winter and summer. During the winter months the hand-holds, drawbars and sill steps of cars are often covered with ice, making it difficult for the switchmen to get on top of a car and making it very easy for said switchmen to be jerked or bumped off (R. 22, 40, 60). He could discharge his duties from the interior of the caboose or from the steps outside the caboose (R. 60).

A caboose also provides a place for the switchmen to keep and carry their necessary flagging equipment, clothing such as rain clothes, coats, etc., and to carry their necessary first aid equipment and lunches and permit the lighting of red lanterns during inclement weather. It is also used to do such clerical work as is necessary when the train is en route (R. 21, 41). Switchmen can observe their train better while it is *en route* and watch the side of their train from a caboose. It is hazardous for a switchman on top of a car or on the end of a car to observe the side of his train (R. 22). A caboose is properly equipped with a whistle and a conductor's valve, an air brake, which permits the switchman on the rear end of the train to have practically the same control of the train that the engineer has with reference to stopping or sounding a warning signal on approaching a highway crossing, etc. (R. 22, 29.) He can perform all the necessary work better from the caboose

(R. 22). Where no caboose is provided, switchmen are required to carry their lunch in their pocket or tie it on the car if some suitable place can be found (R. 29).

A switchman can perform the necessary duties far better from a caboose in observing the running condition of his train, and in flagging and in getting off and on the rear end of his train, in moving motion, also in shoving or back up movements of trains (R. 22).

It is admitted that no cabooses or shelter cabs are provided by appellant for any of the crews working out of certain yards herein involved (R. 163). As to other yards, cabooses are furnished part of the year in some instances and in others all the year round (R. 180).

There are various transfer runs *within the confines of the State of Illinois* which go onto the Eads and Merchants Bridges which span the Mississippi River (R. 187). Most of the overhead and side clearances on these two bridges are insufficient to clear a switchman (R. 20, 188, 199).

Cabooses are not furnished on most of the transfer runs out of Madison Yard or CD Yard in Illinois moving onto these two bridges. Cabooses are furnished upon certain transfer runs originating in the Wiggins No. 2 Yard Illinois and moving onto the Merchants Bridge but only between October 15th and May 1st (R. 187).

At many points there exist numerous insufficient clearances for a switchman to ride the *top* of the rear car (R. 32, 34, 35, 38, 52); and the rules of the Terminal Railroad Association expressly provide that the switchmen must ride the top of the rear car (R. 32); although another rule provides that "riding on the inside of loaded open top cars is prohibited." (R. 141.) Some of these clearances are such that a switchman cannot ride the *side* of the car without being knocked off (R. 32, 34, 35, 36, 42, 52).

The testimony of one R. B. Thomas, Chief Railroad In-

spector for the Illinois Commerce Commission, discloses numerous insufficient vertical and horizontal clearances on various runs, including the runs onto the Eads and Merchants bridges. His reports contain photographs showing the switchmen riding on the rear drawbar of the last car of the train and also showing the various insufficient clearances (R. 100-104, 174-177, inclusive). His testimony clearly shows that the dangers and hazards in question could be eliminated by providing a caboose for the man to ride in (R. 101, 175).

Often the rear switchman rides the drawbar at the trailing end or the rear car. If the end of the car on which he was riding happens to be the end that was provided with a break staff, the switchman is required to grasp it as a means to secure himself in place. If no break staff is provided, he is required to reach further out towards the side of the car in order to reach the end ladder or other handholds. He is also required to brace himself against the end of the car to avoid being shaken off due to sudden stops and starts. Photographs showing a switchman in riding position and details of footing, etc., will be noted (R. 174, 175, 176, 177). Appellant admits a very serious accident on the Eads Bridge to a switchman, Mueller, who was riding on the rear drawbar, when he was jerked off the car and injured (R. 141).

In many instances the trains move up steep inclines fraught with danger. If cars break off, it is very difficult to stop such cars and to avoid loss of life of the public (R. 33, 36, 37). The evidence shows many unprotected crossings (R. 33, 36, 37).

In many instances, where these is no caboose, the switchman is required to stand on the top of the last car in the train while the train is shoving, facing sleet and snow and rain storms and wind. In such cases the switchmen are unable to see where they are going and are required in

many instances to turn their backs for shelter. If this is done, such switchmen cannot observe highway crossings or other dangerous points (R. 23).

In many instances the rear switchman or fore-switchman cannot see the head switchman (45 car lengths away) until the train gets onto a straight road (R. 25). In some instances it is necessary to shove a train without being able to see. Sometimes the cars break off and roll down and it is impossible to stop them by hand brake, in which case it is necessary for the switchman to run ahead of the cars to protect the public (R. 25). A caboose with air brakes properly working would enable the rear man to stop the train in case of such an emergency. A caboose is provided with a conductor's valve (R. 26), so that he can control back-up movements on his train with an air valve provided on the caboose for the purpose of setting the brakes. He can also, with the whistle that is provided on the caboose, warn the public at or near crossings (R. 60). The ability of a switchman using a caboose to stop the cars or warn an approaching train is far greater than it is when he is riding on a drawbar or on the top of a car (R. 60-61).

The evidence shows that other railroads operating runs parallel with the Respondent operate with cabooses; namely, the Pennsylvania, the run from Rose Lake to Madison Yards; the Illinois Central; the C. & E. I., Madison, Illinois, to East St. Louis, Illinois; the Rock Island Railroad, Madison Yard to East St. Louis, Illinois; the Chicago, Burlington & Quincy at Madison Yard and the C. T. Junction; the Illinois Central; the Big Four from East St. Louis, Illinois to Granite City, Illinois; the Alton Railroad out of Venice to various yards (R. 28).

The evidence also shows that various other railroads operating over the Respondent's tracks in East St. Louis, Illinois District and under substantially the same condi-

tions have the use of cabooses (R. 54, 58, 59, 84). As a switchman employed by the Illinois Central testified, "we take a caboose on any run we want a caboose on." (R. 59.)

At the conclusion of the hearings before the Commission, the Commission found that cabooses were necessary on the runs in question because of the operating hazards and dangers to the life, health and safety of the trainmen, employees and the general public and ordered the Appellant to furnish such cabooses (R. 12-13).

The Circuit Court's Order did not challenge the Commission's findings as to the necessity for cabooses but reversed the Commission's order solely on the ground that to order the use of cabooses on such runs as went onto the Eads and Merchants bridges constituted an interference with interstate commerce beyond the power of the Illinois Commerce Commission (R. 204).

An additional correction of appellant's statement should be made: Appellant's statement indicates that the record shows conclusively and without contradiction that it would be impossible to cut off or couple a caboose on the bridges in the middle of the river, so that as a practical matter the necessary effect of the Illinois Commerce Commission's order is to require the appellant to carry its cabooses across the river, and hence without the state of Illinois.

Although, as will appear from the argument, appellees do not deem it decisive or even important whether the compliance with the order requires the physical transportation of cars beyond the confines of the State of Illinois in the light of authorities cited by appellees to the effect that an interstate carrier may be required by state action to comply with orders respecting equipment or crews even though such equipment or crews are necessarily transported outside the state, we note that appellant's statement is in this respect insufficient, inadequate and rather misleading.

Counsel fails, for example, to point out that the evidence shows that on the approach to the Eads Bridge on the Illinois side there are two cross overs (R. 100), that on the approach to the Merchants Bridge on the Illinois side there is one cross over (R. 21), that it would be quite possible to add other cross overs on these bridges in the State of Illinois (R. 21), and that before the tracks enter the tunnel on the Missouri side there is an interval of some 500 feet (R. 77).

While it may well be that the *cheapest* and therefore *most practical* way to comply with the order in question would be to leave the caboose attached to a train after it had left Illinois going West, and to attach a caboose on an East bound train before leaving Missouri, it does not follow that the necessary effect of said order is to require compliance in the State of Missouri.

At page 11 of appellant's statement of the case, counsel say:

> "The furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellants and its switchmen, and cabooses have always been since 1910 and are being furnished by reason of written contracts between the Brotherhoods and appellants (R. 82)."

This is inaccurate. The record in no wise sustains counsel's statement that the furnishing of cabooses has been considered a "working condition" and the balance of his statement is misleading in that it fails to make it clear that cabooses were furnished only on certain runs and at certain times of the season.

Counsel's statements, at page 270 of the record, respecting appellant's evidence as to the delays and costs to result from the order requiring cabooses fails to point out that the testimony in question was the purest kind of hearsay and that it was, in a large measure, based on information acquired by the witness second hand from vari-

ous railroad officials. For example, appellant's witness testified (R. 142):

> "When I say there is a delay of one hour in the Pennsylvania yard, I do not know that of my own knowledge. I am taking their word for it."

His estimate of a 40 minute delay and $10.00 cost per run was likewise without factual basis in the record, and his estimate of a $400,000 outlay for the first year was of the same incompetent character.

At page 270 of the record counsel briefly summarizes the testimony of the Commission's expert witness and says that his testimony was that

> "the initial cost of new cabooses would be $44,000 and the extra annual expense in wages about $62,000, but this estimate did not include anything except wages (Tr. 2-123)."

This is neither fair nor accurate. In the first place, his estimate for the cost of cabooses was *not* $44,000 *per year*. It was a *total investment* in new cabooses. In the second place this estimate was based on 36 new cabooses at a cost of $1,233.69 each (Tr. 2-266) which is the cost estimated not by appellees but by the appellant itself (R. 179). In the third place, the annual extra expense in wages for those handling the added cabooses was estimated at $27,777.22, not $62,000 (R. 201).

Counsel also fails to point out that these estimates given by the Commission's expert were not hearsay, but were the result of ten or fifteen days spent by the witness in appellant's yards riding the various cuts in company with railroad officials. (R. 87-89).

Furthermore, counsel's statement that the "delay would average 11 minutes per run" is not correct. The testimony was that the "handling time" would be 11 minutes per run, which would actually result in perhaps only 3 minutes "delay" per run (R. 90).

Counsel's next statement that

> "The Supreme Court of Illinois found that the delay on each run would be from eleven to forty minutes (Tr. 13),"

is likewise not correct. The nearest approach to such a statement in the opinion is to be found at page 412 of 379 Illinois, where the Court says:

> "The evidence before the commission as to the amount of time consumed was in conflict, ranging from eleven minutes to forty minutes per movement, although appellant (now appellee) concedes that some time is required to add a caboose to these cuts of cars."

Appellant's next statement to the effect that the rear switchman would be able to use the caboose only from one-sixth to one-eighth of his working period, that during the balance of his time he would be exposed to the same or additional hazards, and that the Supreme Court in its opinion so found is not correct and is not supported by the record.

With respect to the facts sustaining the Commission's order as a reasonable and proper "police power" measure to protect the lives and limbs of the trainmen and passengers, the statement is completely silent. In our opinion this is unfair and requires us to add such facts so as to have the true record before this court.

On page 13 of appellant's brief it is said that

> "the caboose would be used only by one employee out of five in each run."

This statement is not true for two reasons. In the first place, a crew consists of *three*, not *five* men (R. 221). In the second place, all of the men of the crew would use the caboose not only for the purpose of carrying equipment, but for the purpose of temporary shelter from the elements, even though all of them could not ride in it at all times. Appellant's statement (at page 13 of its brief)

that an employee could use the caboose only from one-sixth to one-eighth of the time that he worked is without support in the record.

Appellant further makes the statement (*Appellant's brief*, page 14) that the company's losses have been such as to make the order unreasonable and confiscatory.

Appellant's allusion to losses are during the "bad years" from 1929 to 1937. In 1939, however, the company (which is in reality operated as a facility for other railway companies and might perhaps be prudently operated at cost or even with capital contributions) earned over $700,000. In 1928, a year of industrial activity comparable to that of the year in which the order was entered, and to the period during which it was intended to operate, the company earned $1,134,000.

Moreover, these are the earnings of a company which was intended merely as a corporate instrumentality operating facilities for the use of proprietary railroads, whose earnings are not shown.

SUMMARY OF ARGUMENT.

I.

The regulation in question is a reasonable exercise of the state's police power and imposes no unconstitutional burden on interstate commerce.

(i)

Assuming that the order in question is not in conflict with applicable federal regulation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life and health and the promotion of safety, even though it may be enforced with respect to interstate commerce.

Wickard v. *Filburn*, No. 39, October term, 1942, 11 L. W. 4011.

California v. *Thompson*, 313 U. S. 109.

Chicago, R. I. Pac. R. R. Co. v. *Arkansas*, 219 U. S. 453.

New York, N. H. & H. R. Co. v. *New York*, 165 U. S. 628.

Atlantic Coast Line R. R. Co. v. *Georgia*, 234 U. S. 280.

South Covington & C. St. Ry. Co. v. *Covington*, 237 U. S. 357.

Mo. Pac. Ry. Co. v. *Kansas*, 216 U. S. 262.

(ii)

The order in question is, upon a consideration of the particular factual complex in the instant case, inherently reasonable.

See *Argument*.

II.

Congress has not by affirmative action pre-empted the subject matter of the present order from the jurisdiction or powers of the State of Illinois.

Kelly v. *Washington*, 302 U. S. 1.

(i)

State action, if within the police power, is valid unless Congress has affirmatively excluded its exercise by acting directly and immediately upon the subject matter in question, so that the state action is repugnant to the federal action. Such power is not excluded merely because Congress has regulated a part of the field.

Mo. Pac. R. R. Co. v. *Norwood*, 283 U. S. 249.

Kelly v. *Washington*, 320 U. S. 1.

Northwestern Bell Teleph. Co. v. *Nebraska*, 297 U. S. 471.

Welsh v. *New Hampshire*, 306 U. S. 79.

(ii)

The present order is not in conflict with any applicable federal order or regulation.

The Railway Labor Act (U. S. C. A., Title 45, Supplement 236, *et seq.*).

The Interstate Commerce Act, Sec. 1, Pars. (10) through (17), and (21); Sec. 26 and Sec. 20 (a).

The Boiler Inspection Act, (45 U. S. C. A., page 78, Sec. 22, *et seq.*).

The Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*, page 3, *et seq.*).

Mo. Pac. R. R. Co. v. *Norwood*, 283 U. S. 249.

R. R. Comm. v. *Southern Pacific*, 264 U. S. 331.

Robinson v. *B. & O. R. R. Co.*, 222 U. S. 506.

City of Detroit v. *Wabash Refining Co.*, 223 Ill. App. 246.

Thompson v. *Missouri Pacific R. R. Co.*, 15 Fed. (2) 28 (C. C. A. 8th).

Penn. R. R. Co. v. *Public Service Commission*, 250 U. S. 566.

III.

The order does not deprive appellant of its property without due process of law.

C. B. & Q. R. R. Co. v. *Commerce Commission*, 364 Ill. 213.

Chesapeake & O. Ry. Co. v. *Pub. Ser. Comm.*, 242 U. S. 603.

Atl. Coast Line R. Co. v. *N. Car. Corp. Comm.*, 206 U. S. 1.

Mo. Pac. R. Co. v. *Kansas*, 216 U. S. 262.

Washington ex rel., Ore. R. & Nav. Co. v. *Fairchild*, 224 U. S. 510.

C. B. & Q. R. Co. v. *Railroad Comm.*, 237 U. S. 220.

Panhandle E. Pipe Line Co. v. *Comm.*, 294 U. S. 613.

N. Y., N. H. & H. Co. v. *New York*, 165 U. S. 628.

Atl. Coast Line Co. v. *Georgia*, 234 U. S. 280.

Penn. Coal Co. v. *Mahon*, 261 U. S. 393.

ARGUMENT.

Brief Introductory Statement.

Appellees' argument can, it is believed, be more clearly presented and more readily followed if, before developing in detail the points under which it is presented, we briefly indicate, without the consideration of authorities or extended comment, its essential substance and content.

Appellant argues first that the order is invalid because, as appellant asserts, "Congress has occupied the field" and next argues that, even if Congress has not occupied the field, the order is void because it "directly and unconstitutionally burdens interstate commerce." However, appellees conceive that the question of the state's power **in the absence** of federal action logically precedes the question whether that power has been superseded or abrogated by federal action. Accordingly we depart from the sequence of appellant's argument.

* * * * *

Appellees submit that appellant's argument is prepossessed by certain fundamental misconceptions as to the general constitutional principles applicable to this and similar cases. Although the classical idiom of the older opinions discussing cases such as the present one insisted upon a discrimination between "direct" and "indirect" burdens upon interstate commerce, it is clear that these terms early acquired highly sophisticated connotations; and that, as this court has said in the *Wickard case*, No. 59, October term, 1942, they were frequently used to

> "**state** rather than **reach** a result."

As this court observed in the *Wickard case*, the use of the term "direct" as opposed to "indirect"

> "of late * * * has been abandoned in cases dealing with federal power under the commerce clause."

Appellees contend that, whatever may have been the signification of the terms "direct" and "indirect" in the particular contexts in which they have frequently occurred, this court has consistently and, in the main, unerringly perceived a fundamental distinction between those instances of state action which not only affect interstate commerce, but which **have the regulation of interstate commerce, for the sake of such regulation, for their primary and immediate purpose**, on the one hand, and, on the other hand, those state regulations which may no less certainly influence interstate commerce but which **affect it only incidentally to the accomplishment of a purpose within the police power of the state.**

The **first** type of regulation, such as the levying of imposts, the fixing of rates and charges for interstate transportation and the like, is void even though the regulation is not inherently unreasonable and even though congress has not acted with respect to the subject matter.

The **second** type of regulation, such as measures intended to preserve health, promote safety, or protect property, is valid unless **either** (1) the burden that it lays upon interstate commerce is **unreasonable** in contemplation of the object sought to be attained, **or** (2) it is in conflict with an **actual exercise** of congressional power.

Under the first point of this argument, appellees contend that the order in question clearly had for its purpose and object the protection of health and the promotion of safety, not only of appellant's employees, but of the public; that its purpose was within the ambit of the police power; and that the order was not intrinsically unreasonable. Appellees do not, under their first point, deal with appellant's contention that congress has occupied the field.

* * * * *

Appellant likewise misprises the general principle governing the questions raised by the assertion that the order is in conflict with applicable federal statutes and regula-

tions. Appellant assumes that the mere fact that Congress has legislated, perhaps rather comprehensively, with respect to a given subject matter excludes state action. The true rule, as shown in the authorities considered under the second point of this brief, is that state action

> "is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts 'cannot be reconciled or consistently stand together,' " (*Kelly v. Washington*, 302 U. S. 101).

Under appellees' second point, appellees demonstrate that, notwithstanding appellant's argument to the contrary, congress has not occupied the field or so exerted its power as to exclude state action. In particular, it will be shown that the matter of cabooses on appellant's trains is not a mere working condition; that the regulation pertains not only to the health of appellant's employees, but to the safety of the public; and that the interstate commerce act has **expressly reserved** to the states power to enact regulations of the sort here in question.

Under the third point of appellees' argument, it will be very briefly pointed out that if appellees are correct in their first contention that the order does not unreasonably burden interstate commerce, *a fortiori* it is not so unreasonable as to amount to a confiscation of appellant's property without due process of law; and that appellant's contention that compliance with the order would be so costly as to amount to confiscation is without foundation in the record.

I.

The regulation in question is a reasonable exercise of the state's police power and imposes no unconstitutional burden on interstate commerce.

Under the present point appellees argue the following premises.

Appellees' major premise:

Assuming (as is shown under Point II of this argument, *post*) that the order in question is not in conflict with applicable federal regulation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life and health and the promotion of safety, even though it may be enforced with respect to interstate commerce.

Appellees' minor premise:

Upon the facts in the instant case, the order is such a reasonable exercise of the state's police power as to be within the rule above stated as the major premise.

(i)

Assuming that the order in question is not in conflict with applicable federal regulation, it must be sustained if it is a reasonable measure having for its purpose and legitimate object the preservation of life and health and the promotion of safety, even though it may be enforced with respect to interstate commerce.

Appellees submit at the outset that it is clear, without, for the moment, considering any other questions that may be involved in this case, that the order in question may not be condemned as unconstitutional upon any theory that it is void merely because it imposes a burden upon interstate commerce and by characterizing that (supposed) burden as "direct."

In the **first** place, as appellant itself concedes by quoting at page 47 of its brief the language of this court in the *Wickard case* above cited, insistence upon any categorical distinction between "direct" and "indirect" burdens

> "has been abandoned in cases dealing with questions of federal power under the commerce clause."

In the **second** place, even if we follow appellant in its resort to the distinction between the terms "direct" and "indirect," although appellant itself not only concedes but

argues that this contrast in terms has been abandoned, it is clear that even under the older cases using those terms, a burden charactrized as "direct" was almost invariably either one **not related to the exercise of the police power** or one which resulted in an **unreasonable** exercise thereof.

On the other hand, this court has consistently upheld state action which had for its purpose the preservation of health or the promotion of safety and which was reasonably adapted to that purpose, even though the regulation prescribed equipment which must be carried on interstate trains.

These distinctions have recently found compendious expression in the decision of this court in *California* v. *Thompson*, decided April 28, 1941, 313 U. S. 109, 95 L. Ed. 1219. A pertinent excerpt is printed in the margin.*

Other cases recognizing the right of the states to adopt measures which are intrinsically reasonable, which have for their object those ends properly within the sphere of the police power and which are not in conflict with existing

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* *California* v. *Thompson*, 313 U. S. 109, at page 113:

"As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, *even though the regulation affects interstate commerce*. Ever since *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. ed. 412, and *Cooley* v. *Port Wardens*, 12 How. (U. S.) 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in *Di Santo* v. *Pennsylvania*, *supra* (273 U. S. 40, 71 L. ed. 528, 47 S. Ct. 267).

"A state may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 9 S. Ct. 28, 2 Inters. Com. Rep. 238. It may define the size of crews manning interstate trains. *Chicago, R. I. & P. R. Co.* v. *Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; *Missouri P. R. Co.* v. *Norwood*, 283 U. S. 249, 75 L. ed. 1010, 51 S. Ct. 458, 30 N. C. C. A. 639, and

federal regulation are noted under this point because a study of them corrects in general terms appellant's misapprehension of the distinction between state action which burdens interstate commerce **as its immediate purpose and object** and such action as no less certainly affects interstate commerce but does so only **incidentally to an exercise of the state's police or other proper power.**

Such of these cases as are more immediately pertinent to the instant case are considered in their more specific applications in later and more appropriate points.

In *Chicago, R. I. Pac. R. R. Co.* v. *Arkansas*, 219 U. S. 453, this court upheld the Arkansas Full Crew Law, a statute fixing the minimum number of men required on trains, notwithstanding the fact that the state of Arkansas enforced it in respect to trains travelling directly in interstate commerce.

In *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, this court upheld a state regulation prescribing the type of stoves to be carried on interstate trains.

In *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, this court upheld a state statute requiring headlights of a certain size and type, even though the statute was enforced with respect to trains travelling between states.

In support of its contention that even in the absence of

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prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams*, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L. R. A. (N. S.) 1097. It may require interstate passenger cars to be heated and guard posts to be placed on bridges of an interstate railroad. *New York, N. H. and H. R. Co.* v. *New York*, 165 U. S. 628, 41 L. ed. 853, 16 S. Ct. 418. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. 819. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Comrs.*, 254 U. S. 394, 409, 412, 65 L. ed. 322, 333, 334, 41 S. Ct. 169, P. U. R. 1921C 143. It may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting local health. *Morgans, L. & T. R. & S. S. Co.* v. *Louisiana*, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; *Compagnie Francaise de Navigation a Vapeur* v. *State Bd. of Health*, 186 U. S. 380, 460 L. ed. 1209, 22 S. Ct. 811. It may regulate and protect the safe and convenient use of its harbors and navigable waterways unless there is conflict with some act of Congress. *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, 7 L. ed. 412, *supra*; see *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267, 80 L. ed. 215, 219, 56 S. Ct. 194.

congressional action, the regulation now in question is invalid, appellant cites and relies heavily, if not principally, upon this court's decision in the case of *South Covington & Cincinnati Street Railway Co.* v. *Covington*, 235 U. S. 537. The fact is that the *Covington case*, cited by appellant as conclusive of the issues in this case, in fact actually **supports appellees' contentions** and confirms the principles announced in the cases relied upon by appellees, without in any wise changing, modifying, or reversing any of them.

In the *Covington case*, this court held **invalid** those portions of a city ordinance that sought to regulate the number of passengers to be transported by street car from Kentucky to Ohio, as well as those provisions that sought to regulate the temperature of the cars. But in the same opinion this court held **valid** those portions of the **same ordinance** which contained provisions **forbidding the carrying of passengers on front and rear platforms unless such platforms were equipped with suitable rails or barriers.**

The court further held **valid** those provisions which **required cleaning and ventilation of the cars at least once a week and fumigation with a disinfectant subject to control by the city board of health.**

There is an incisive analogy between the decision in the *Covington case*, which held valid the provisions with respect to "suitable hand rails" for the protection of the public, and the order in the instant case, which requires the carrying of a caboose on the rear of appellant's trains. The mere fact that a caboose might be taken over the Eads Bridge or the Merchants Bridge into Missouri is purely consequential, just as it was consequential that the rail or barrier on the front and rear platforms of the street cars in the *Covington case* would necessarily be carried from Kentucky into Ohio.

Counsel for appellant erroneously assume that the basis of the court's distinction between those portions of the ordinance which were held valid and those portions which were held unconstitutional was that the provisions sustained

by this court could be complied with entirely in the State of Kentucky. **This was not the distinction drawn by the court.** It is clear from a reading of the whole of the opinion in this case that the provisions with respect to maintaining a minimum temperature and with respect to the number of passengers which might be carried were held **unreasonable**, since it appeared that it was not feasible to assure a minimum temperature within the car regardless of variations of weather temperature, nor did the carrying of a number of passengers greater than that which could be comfortably accommodated result in real danger to life **unless such passengers were crowded on improperly guarded platforms.**

That the true basis of the court's decision was **not** that the provisions with respect to hand rails might be enforced solely within the territorial confines of the State of Kentucky but was the **reasonableness** of the provisions, as opposed to the **unreasonableness** of other provisions, appears beyond all possible doubt from the following statement of this court at page 548:

> "We think these regulations come within that class in which the court has sustained the right of the local authorities to safeguard the traveling public • • • only incidentally affecting the interstate business, and not subjecting the same to unreasonable demands. *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628; *Lake Shore & Michigan Southern Ry.* v. *Ohio*, 173 U. S. 285; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 291, 292."

The cases cited by the court in the excerpt immediately above quoted as sustaining the statement above set forth are cases in which the state regulations in question could not be complied with entirely within the geographical limits of the enacting state.

The first case cited by the court in the excerpt above quoted, *New York, N. H. & H. R. R.* v. *New York*, 165 U. S. 628, upheld a statute of the State of New York which required the equipment of interstate trains with stoves in

conformity with the terms of the statute, notwithstanding the fact that such stoves had to be transported in interstate commerce.

The case of *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, cited by this court in support of its decision with respect to the hand rails in the *Covington case*, required the installation of headlights on interstate trains. Appellant is therefore clearly wrong in its contention that the ordinance was sustained because it did not affirmatively require the installation of handrails, provided that passengers were excluded from the platforms in the State of Kentucky. This court sustained the provisions in question **not** because the ordinance could be complied with entirely in Kentucky, **but on the authority of cases sustaining police regulations, even though such regulations applied to interstate trains.**

If the States of New York and Georgia may validly prescribe the type of stoves and headlights to be carried by interstate trains, if the cases sustaining such regulations required a conclusion sustaining an ordinance respecting hand rails on the front and rear of interstate street cars in the *Covington case*, it is clear that the mere fact (if, indeed, it is a fact) that appellant may have to transport its cabooses across the state line into Missouri affords no basis for declaring invalid the order now in question.

Other language of the *Covington case* indicating that the basis of the court's decision as to the validity of the provisions respecting hand rails is that of reasonableness is set forth in the margin.*

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* *South Covington and Cincinnati St. Railway Co.* v. *Covington*, 235 U. S. 537, at page 545:

"Reaching the conclusion that the traffic here regulated is of an interstate character, and therefore within the control of the Federal Congress, the further question is presented: Does the case come within that class wherein the state may regulate the matter legislated upon until Congress has acted by virtue of the supreme authority given it by virtue of the commerce clause of the Constitution. In numerous instances this court has sustained local enactments, passed in the exercise of the police power of the state, in the interest of the public health and safety, notwithstanding the regulation may in-

Similarly, in the case of *Missouri Pacific Railway Co. v. Kansas*, 216 U. S. 262, this court upheld an order of a state commission requiring the operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas state line, even though there were no terminal facilities at the state line, so that as a practical matter, trains had to be run into the adjoining state.

The case last cited is particularly apposite to the instant case since there, as here, the railroad could comply with the terms of the order if it cared to build switch tracks at the state line, precisely as appellant could, if it desired, use the cross-overs on the bridges in the state of Illinois (Tr. 2-21, 2-29, 2-108).

Under the present point, as we have indicated, it is appellees' major premise that (without, for the moment, considering appellant's contention that state action has been excluded by federal action) the order in question must be sustained if its purpose is within the police power and if, upon a consideration of the particular factual complex in the instant case, the influence exerted upon interstate commerce is not unreasonable in contemplation of the relation of burdens and benefits.

It is appellees' minor premise that the present order is a reasonable exercise of the police power in the light of the instant facts. We now turn to a consideration of the proposition embodied in this latter premise.

(ii)

The order in question is, upon a consideration of the particular factual complex in the instant case, inherently reasonable.

We do not deem it necessary to cite authority for the fundamental principle that the question of reasonableness

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cidentally or indirectly affect interstate commerce. The subject was given much consideration in the Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, and the previous cases dealing with this subject are therein collected and reviewed. In the light of these cases, and upon principle, the conclusion is reached that it is competent for the state to provide for local improvements or facilities, or to adopt reasonable measures in the interest of the health, safety, and welfare of the people, notwithstanding such regulations might incidentally and indirectly involve interstate commerce."

or unreasonableness was one addressed, in the first instance, to the sound discretion and to the presumably informed judgment of the Illinois Commerce Commission; and that, in the second instance, this question was addressed to the Supreme Court of Illinois.

Unless, therefore, this court can declare that both the Illinois Commerce Commission and the Supreme Court of Illinois have reached a determination so arbitrary and unreasonable as to be unconstitutional, the issue of the reasonableness of the order must be deemed to have been conclusively foreclosed in favor of appellees.

We turn briefly, then, to the facts upon which the present order was entered.

The leading facts, with appropriate reference to the record, have already been set forth in appellees' statement of the case, to which statement reference is here respectfully made. In the present argument, however, we emphasize the fact that appellant's employees are required to ride on the rear coupler of the car at points where overhead and side structures will not give clearance for them on top or at the side of the cars, that therefore they must ride on the rear coupler; that much of such riding must be done in sub-zero or other inclement weather, when the cars are coated with ice and sleet; that the evidence showed positively that such a position is essentially a precarious one; that there is particular danger of employees' being knocked off the top or the end of the train by a sudden jerk or stop; that at least one serious injury has resulted from the dangers indicated by the conditions in question; and that many of the employees' duties could be discharged from the interior of the caboose. (*See photographs*, 175, 176, 177, 191, 193, 194.)

Moreover, the evidence shows that cabooses are equipped with rear whistles and air brakes, the object of which is important when trains are backing at public crossings or in yards where other employees may be working. The evidence shows that the rear whistle "and conductor's valve,"

an emergency brake, afford the switchman on the rear end of the train practically the same control that the engineer has with reference to stopping or sounding a warning signal on approaching highway crossings or in the yards. Moreover, there is positive evidence in the record that a switchman can better observe traffic and train operations from the cupola of the caboose. The caboose also furnishes a place for necessary clerical work and for the storage of equipment, lunches and the like.

Although counsel writing this brief are anxious to restrain any argument in the nature of impassioned declamation, it is respectfully suggested that, if one imagines for but a moment the case of a man hanging on the side handholes or the rear coupler of a freight train, for a matter of hours, blinded by snow in a temperature well below zero, clinging to iron bars coated with ice, while the train is going first forward, then backwards, with intermittent jerks, kicks and stops, and if one will contrast this vision with that of the interior of a caboose, he will be unable to say that the Illinois Commerce Commission and the Supreme Court of Illinois have acted so arbitrarily and unreasonably in requiring cabooses on appellant's trains that this court has no alternative, under the mandate of the Constitution, but to declare the regulation void.

II.

Congress has not by affirmative action pre-empted the subject matter of the present order from the jurisdiction or powers of the State of Illinois.

Appellant contends that even if, in the absence of federal action, the State of Illinois would have the authority under its inherent police power and other faculties of its sovereignty to impose the regulation embodied in the present order, it does not now possess that power because, as appellant maintains, Congress has so far occupied the field

as to pre-empt from the states control over the number of cabooses on interstate trains.

This contention rests upon two distinct fundamental misconceptions, which misconceptions may, it is submitted, be corrected by the following observations:

First. Appellant is incorrect in its basic assumption that state legislation is invalid merely because it relates to matters which have been the subject of federal action. The true rule is that, assuming that the state action is such that it would be valid under the police powers in the absence of federal action, it is valid unless Congress has so exerted its powers that, in the language of this court in *Kelly* v. *Washington*, 302 U. S. 1,

> "the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

In other words, mere regulation affecting the field will not oust state action. **The federal regulation must be of such character that it is inconsistent with the state action in question.**

Second. Appellant misapprehends the scope of the federal legislation upon which it relies in its argument that Congress has pre-empted the field. It will be shown that notwithstanding appellant's contention to the contrary, the acts of Congress cited by appellant do not amount to such an assumption by Congress of the subject matter of the present order as to exclude state action.

(1)

State action, if within the police power, is valid unless Congress has affirmatively excluded its exercise by acting directly and immediately upon the subject matter in question so that the state action is repugnant to the pledged action. Such power is not excluded merely because Congress has regulated a part of the field.

Before considering the specific acts upon which appellant relies as excluding state action in the present case, we briefly consider the scope of the principle that federal

action with respect to interstate commerce excludes state action.

The governing criterion is set forth in the case of *Missouri Pacific R. R. Co. v. Norwood*, 283 U. S. 249. That case has already been cited as supporting the present order as a reasonable exercise of the state's police power. The case is likewise pertinent under the present point, however, for it dealt—adversely to the contentions of appellant in the present case—with the contention that federal action excluded state action merely because they related to a similar subject matter.

That case, as we have observed, involved the Arkansas Full Crew Law, which regulated the number of men on crews of interstate trains. It was contended there, as it is contended here, that federal action had excluded state action.

This court said at page 256:

> "In the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews."

This court's opinion in the case of *Kelly v. Washington*, 302 U. S. 1, already briefly noticed, affords a clear exposition of the general principle in question. In that case it was contended that state legislation providing for the inspection and regulation of motor tugboats operated in intrastate, interstate, and foreign commerce over navigable waters was void, because Congress had occupied the field.

Federal enactments regarding motorboats constituted, in the words of the court, "a maze of regulations". However, the Federal Motorboat Act (1910, 36 Stat. 462), which had been passed when internal combustion engines were exceedingly uncommon, regulated only motor boats powered by steam. An amendment passed in 1936 (c. 628,

49 Stat. 1544) extended such regulation to motorboats of 300 gross tons and over, propelled by internal combustion engines. Thus left unregulated by the Government were respondent's vessels, which, though having internal combustion engines, were of less than 300 tons' burden.

In spite of this partial occupation of the field by Congress, this court sustained state regulation over the respondent's boats. The court said at page 9:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases*, 230 U. S. 352. States are thus enabled to deal with local exigencies and to exert **in the absence of conflict with federal legislation** an essential protective power. * * * There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, **is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'** "

Similarly, in *Northwestern Bell Teleph. Co.* v. *Nebraska*, 297 U. S. 471, this court sustained a state requirement of a composite depreciation rate of 3½% on all its depreciable property in Nebraska, notwithstanding the fact that the Interstate Commerce Act, Sec. 1 (1) and Sec. 20 (1)(5), as amended in 1936 (36 Stat. 555), gave the Interstate Commerce Commission authority in its discretion to prescribe uniform systems of accounts for telephone companies, and made it unlawful for them **to keep any accounts other than those prescribed by the Commission.**

The court said at page 480:

> "No exertion of federal authority * * * forbids the making of entries in appellant's accounts or the

doing of anything that is by the state commission's order directed to be done. Pending action by the Communications Commission establishing depreciation rates for telephone companies, state control over such rates remains unimpaired."

In the case of *Welsh* v. *New Hampshire*, 306 U. S. 79, this court upheld a statute of the State of New Hampshire which provided for the control of the hours of service of drivers of motor carriers in interstate commerce. It was contended that the provisions of the state act were excluded by the Federal Motor Carriers act of 1935, and the regulations prescribed under it by the Interstate Commerce Commission. This court sustained the regulation, notwithstanding that Congress had addressed the same subject matter, because there was neither a conflict between state and federal regulations nor a clearly evinced intent by Congress to exclude state regulation.

The purpose of the Commission's order in the present case is to preserve the lives, promote the safety, and protect the health of employees and of the public. It is submitted that federal intent to forbid such action by the state should "not be lightly implied"; but that the order should be sustained unless it is in direct conflict with applicable federal regulation or is patently inconsistent with a clearly expressed federal purpose.

Under the immediately following subpoint, we shall show that notwithstanding appellant's argument to the contrary, the order in question is **not** in conflict with any applicable federal statute or administrative regulation.

(ii)

The present order is not in conflict with any applicable federal act or regulation.

Appellant relies upon the following acts or portions of acts as constituting federal pre-emption of the subject matter of the present order:

The Railway Labor Act (U. S. C. A., Title 45, Supplement 236, *et seq.*).

The Interstate Commerce Act, particularly Sec. 1, Pars. (10) through (17), and (21); Sec. 26, and Sec. 20 (a) [U. S. C. A., title 49].

The Boiler Inspection Act (45 U. S. C. A., page 78, Sec. 22, *et seq.*).

The Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*, page 3, *et seq.*).

Appellees will demonstrate that none of the enactments above relied upon is either inconsistent with the regulations or evincives of an intent to exclude from state authority the subject matter of the present order.

The Railway Labor Act.

In the first place, the national Railway Labor Act pertains only to disputes between employers and employees with respect to working conditions and the like. The present order was promulgated not only for the safety of appellant's employees, but for the safety of the public.

In the second place, that act does not confer authority upon any federal agency to regulate the operations or facilities of railroads, the primary intent of the act being to compel the railroads to deal collectively with their employees for the purpose of eliminating strikes. The act provides, first, that employees may organize and bargain collectively; and that after a dispute arises they shall first attempt to adjust it among themselves; and that thereafter

either party may invoke the services of the adjustment board, request mediation, or agree to arbitration.

The case of *Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249, has already been cited because it contains an excellent statement of the principle that state regulation will not be pronounced invalid unless in conflict with the express or clearly implied will of Congress. That case is immediately in point in the present connection, however, because in that case it was contended that the Arkansas Full Crew Law was rendered invalid by the National Railway Labor Act. This court held that the Railway Labor Act, by its reference to the subject of working conditions, did not preclude the states from enacting a law governing the number of members of crews on interstate trains. The measure being one intended for the safety of the public as well as of employees, it could not be said that the state sought to supersede the federal program for the adjustment of disputes as to working conditions.

It is submitted that the order in question is not inconsistent with either the express provisions or the intent and purpose of the Railway Labor Act.

The Interstate Commerce Act.

Appellant argues that the order in question is in conflict with the Interstate Commerce Act. Appellant does not point either to any provision within the text of that act or to any regulation promulgated under its authority which is in conflict or inconsistent with the order in question. Precisely the same contention was made in the Arkansas Full Crew case, already cited and discussed in other connections (*Missouri Pacific R. R. Co.* v. *Norwood*, 283 U. S. 249). This court rejected the contention, holding that nothing in the Interstate Commerce Act derogated from the state's power to adopt reasonable safety measures.

Sec. 1, Par. 17, of the Interstate Commerce Act (U. S. C. A. Title 49, page 120) contains the following provisions:

"• • • Provided, however, that nothing in this

chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, **except in so far as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter.**"

It is clear, both from the text of the Interstate Commerce Act and from the decisions of this court pronounced since its enactment, that it was not the intent of Congress so to pre-empt the field of interstate railroading or that the states should no longer have the authority, in the exercise of their police power, to adopt reasonable measures for the preservation of the lives and health of their citizens and of railroad employees. No such revolutionary or far-reaching purpose has been expressed by Congress, nor has such a purpose been recognized by any decision of this court.

This is clearly emphasized by the fact that Congress itself has explicitly declared, in the excerpt above quoted, that nothing in the entire chapter shall impair or affect the state's police power except in so far as any state requirement may be inconsistent with any lawful order of the Commission made under the provisions of the chapter.

Appellant fails to indicate any provision of the act which is repugnant to the Interstate Commerce Act or which, in the language of Congress,

> "is inconsistent with any lawful order of the Commission made under the provisions of this chapter."

> sion made under the provisions of this chapter,"

or such that, in the language of this court, already cited,

> "the repugnance is so 'direct and positive' that the two acts 'cannot be reconciled or consistently stand together.'"

Appellant relies on the case of *Railroad Commission* v. *Southern Pacific*, 264 U. S. 331. That case is not parallel to the instant case on the facts; but the principle which it recognized supports the appellees, not appellant. In that case this court said:

> "Only a lawful order of the Interstate Commerce Commission would raise the question of the power of

> the state commission in such case, as the proviso of page 17, Chapter 402, of the Transportation Act shows,"

the proviso above cited being that immediately quoted above in this argument.

There is nothing in the record in the instant case to show that the Interstate Commerce Commission has in any wise sought to regulate appellant's cabooses or that it has undertaken to forbid state regulation.

In the absence of any such showing, the presumption must be that there was no such regulation, since the state courts do not take cognizance of administrative orders of the Interstate Commerce Commission. *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506, 512; *City of Detroit* v. *Wabash Refining Co.*, 223 Ill. App. 246, 251; *Thompson* v. *Missouri Pacific R. R. Co.*, 15 Fed. (2) 28, 31 (C. C. A. 8th).

Thus both Congress and this court have declared that the Interstate Commerce Act (which act includes the Transportation Act) does not derogate from the states' police power unless the Commission has promulgated a regulation which is in direct conflict with state action.

Since no such regulation exists in the instant case, it must be concluded that appellant is incorrect in its argument that the present order must fail because of the Interstate Commerce Act.

The Safety Appliance Act and the Boiler Inspection Act.

Appellant's argument that the Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*, at page 3) and the Boiler Inspection Act (45 U. S. C. A., page 78, Sec. 22) exclude the Illinois Commission's jurisdiction to enter the order in question is likewise based upon the fundamental premise that the mere fact that Congress has legislated with respect to a particular subject matter is in and of itself sufficient to exclude state action. We have already shown under

Sub-Point (i) of the present Point in this brief that this initial premise is unsound, the true test being whether the state action is directly repugnant to federal action.

Appellant fails to point out any provision of either the Safety Appliance Act or the Boiler Inspection Act which is inconsistent with the regulation now under review.

In support of the contention that the present order is in conflict with the Safety Appliance Act, appellant relies on the case of *Penn. R. R. Co.* v. *Public Service Commission*, 250 U. S. 566. That case does not support appellant; but it is nevertheless of interest in the present case because it affords an excellent illustration of the kind of repugnance between state and federal action which is within the rule that state regulation will not be sustained when it contradicts federal regulation. In that case the federal regulation required caboose cars **without platforms**. The state regulation required caboose cars **with 30-inch platforms**. It would have been impossible to obey the state regulation without violating the federal law. We submit that the mere statement of the facts in that case makes it evident that the decision in that case cannot control the decision here.

In this case it does not appear that there is any regulation on the part of the Interstate Commerce Commission with respect to cabooses. But even if it appeared in this case, as it affirmatively appeared in the case last above cited, that the Interstate Commerce Commission had regulated the **type** of cabooses which must be used **when cabooses were to be used at all**, still those regulations would be completely silent as to when, where, and under what circumstances appellant would be required to carry cabooses on its trains. Therefore, so far as anything in the Safety Appliance Act is concerned, the State of Illinois possesses the same power to order cabooses that it has always had, in virtue of its police power, except that of

course it could not command a type of cabooses on interstate trains which was forbidden by act of Congress or a valid order of the Interstate Commerce Commission.

* * * * *

Appellant's argument that the order is void because federal action has superseded the state's jurisdiction is erected entirely upon its assumption that mere regulation of the subject matter by Congress excludes regulation by the states. The correct rule is, as has been shown, that the state's police power is not impaired if its regulations are not so directly repugnant to federal action that both state and federal regulations cannot stand. Appellant has totally failed to point to any regulation inconsistent, either in its direct terms or by fair implication, with the order in question; nor has appellant cited any act by which Congress has assumed plenary and exclusive jurisdiction of the field.

Therefore it is submitted that appellant's argument that the order in question is void for repugnancy to federal action cannot be sustained.

III.

The order does not deprive appellant of its property without due process of law.

It is contended by appellant that the benefits accruing from the order are in effect so disproportionate to the expense involved and that the cost so exorbitant compared to the benefits that the order constitutes a deprivation of appellant's property without due process of law, in contravention to the Fourteenth Amendment to the Constitution of the United States.

It is contended that the order requiring the furnishing of cabooses for the protection of the life and safety of the trainmen, as well as of the public at large, would be of slight benefit as compared with the cost to which appellant would be put to in complying with the order. In other words, appellant seeks to compare the benefits derived from the order with the cost entailed by such compliance

in order to determine whether or not the order violates the due process clause.

Under Point I of the present brief, appellees have argued that the order is inherently reasonable as an exercise of the state's police power as against the contention that it unconstitutionally burdens interstate commerce. Much of that argument is pertinent here.

However, under this Point, we reply to appellant's contention that, without regard to any question raised by the learning of interstate commerce, the order is confiscatory.

Appellant seeks to minimize the dangers which the order seeks to avoid, not only to the trainmen, but to the public at large, in the proper operation of a train. It is urged that there is only a small benefit accruing to one member of each crew by reason of furnishing cabooses and that the undisputed evidence in the record shows (R. 228) that for a long time, injuries to employees on the rear end of a train have been far less when no caboose was provided than when one was furnished. This is not a fact and the record fails to support appellant's contention. Appellant relies upon its Exhibit 19, which is a compilation showing that there were eight injuries to switchmen due to *sudden stops* while they were in cabooses. The exhibit, however, fails to show how many men were injured while not in cabooses.

We submit that this exhibit clearly emphasizes the necessity for the order to protect the life, health and safety of the trainmen. If as a result *of sudden stops*, switchmen are injured while in cabooses, how much more so are they likely to be injured while they are required to ride the rear coupler of a car and particularly so during inclement weather?

In *C. B. & Q. R. R. Co. v. Commerce Commission*, 364 Ill. 213, 222, one of the cases cited and relied upon appellant, the Court, in passing upon this question aptly said:

"The fact that only one employe has been killed is not of itself sufficient to show that a dangerous con-

> dition does not exist. * * * When a hazard is shown to exist and may be eliminated without unreasonable expense or imposing onerous conditions, it is not necessary to wait until casualties result before requiring the evil to be remedied, even though other hazards necessarily incident to the business still remain."

In the statement of facts, *supra*, appellee has called attention to the testimony showing the reasonable expenses involved in the furnishing of the equipment by appellant and has pointed out that the extravagant claims as to exorbitant costs by appellants are wholly unsupported by any competent evidence in the record.

The Supreme Court of Illinois in the instant case, after calling attention to the fact that there was a sharp dispute in the testimony on the question of expenses of labor involved and the purchase of the caboose, said:

> "We are of the opinion that those expenses on this record are to be classed with those inconveniences referred to in the cases herein cited as not affecting the power of the State to impose the regulation, unless so clearly unreasonable as to be beyond State power. This record does not so indicate."

We submit that this decision of the Supreme Court of Illinois on this record is correct.

Appellant in its brief relies upon numerous authorities therein cited, some of which have no application whatever to the case here under consideration, while the balance fu... support the decision of the Supreme Court of Illinois herein.

In *Chesapeake and Ohio Railway Company* v. *Public Service Com.*, 242 U. S. 603, 61 L. Ed. 520, one of the cases cited and relied upon by appellant, this Court lays down the rule applicable to the case herein in question in the following language (page 607):

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This

duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, **and its performance cannot be avoided merely because it will be attended by some pecuniary loss.**" (Emphasis ours.) Citing: *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission*, 206 U. S. 1, 26, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; *Missouri P. R. Co.* v. *Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 529, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535; *Chicago, B. & Q. R. Co.* v. *Railroad Commission*, 237 U. S. 220, 229, 59 L. ed. 926, 931, P. U. R. 1915C, 309, 35 Sup. Ct. Rep. 560.

In *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, likewise relied upon by appellant, this Court said at page 529:

> "If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, **even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.'**"

In *Panhandle E. Pipe Line Co.* v. *State Highway Com.*, 294 U. S. 613, also relied upon by appellant, this Court recognizes that the police power of a state springs from the obligation of the state to protect its citizens and to provide for the safety and good order of society; that as a part of the governmental power of self-protection, it is permitted reasonably to regulate rights and property; and that a railway company, in accepting its franchise from the state, necessarily does so subject to the condition that it would conform, **at its own expense**, to any regulations, not arbitrary in their character, which have for their object the safety of the public or the promotion of the public convenience.

See also *Atlantic Coast Line R. R. Co.* v. *North Carolina Corp. Com.*, 206 U. S. 1, 25, 26.

In the opinion of the Supreme Court of Illinois in the instant case, various decisions are quoted in which this Court has held that the railroad companies were not deprived of their property without due process of law. *New York, New Haven Co.* v. *New York*, 165 U. S. 628; *Atlantic Coastline Co.* v. *Georgia*, 234 U. S. 280, and others.

We submit that most of the cases relied upon by appellant fully support our position herein. A few of the cases cited by appellant are easily distinguishable on the facts, such as that of *Pennsylvania Coal Co.* v. *Mahon*, 261 U. S. 393, in which it was held that a statute forbidding the mining of coal under private dwellings or streets was unconstitutional as taking property without due process of law where the right to mine coal was expressly reserved under a grant.

We submit that if appellant elects to operate freight trains and employ switchmen in connection therewith, it cannot evade its duty imposed by law to furnish all reasonable means and methods to protect its crews and the public against hazards, accidents and injuries.

The cost involved, we submit, is insignificant compared to the good achieved and to be achieved by the order entered by the Illinois Commerce Commission in providing for cabooses so as to avoid not only the accidents that occur but also to minimize the dangers and hazards to which the switchmen are subjected in the course of their occupation.

The order does not, as contended, deprive appellant of its property without due process of law.

* * * * *

In the foregoing discussion, appellees have argued the merits of the issue of confiscation precisely as though the question of the reasonableness of the order were addressed to this court in the first instance. However, the question properly before this court is, of course, not whether this

court would dispose of the question of confiscation favorably to appellant in the exercise of its independent judgment, but whether the Illinois Commission and the Supreme Court of Illinois could reasonably find that the order in question was proper.

It is respectfully submitted that, in so far as the question of reasonableness and confiscation is concerned, the order is supported by very substantial evidence, and that therefore it should not be disturbed by this court.

CONCLUSION.

For the reasons urged in the foregoing argument, appellees submit that the judgment of the Supreme Court of Illinois affirming the order of the Illinois Commerce Commission in question was correct and that it should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 218.—October Term, 1942.

Terminal Railroad Association of St. Louis, Appellant, vs. Brotherhood of Railroad Trainmen, et al.	On Appeal from the Supreme Court of the State of Illinois.

[January 18, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

Appellant is a corporation engaged in performing terminal services and furnishing terminal facilities in and about East St. Louis, Illinois, to a number of railroad companies which share its ownership and control. It operates several yards for the sorting and classification and interchange of cars, with some service to industries within the switching district.

The Brotherhood of Railroad Trainmen, one of the appellees, representing trainmen and switchmen employed by appellant, complained to the Illinois Commerce Commission of appellant's failure to provide caboose cars for its employees. In answer the appellant denied that the Commission had power to enter any order that would relate to movements in interstate commerce, which it said included substantially all of its operations; and it contended further that it had already provided all reasonably necessary facilities. The issues were sharply contested before the Commission, and the evidence, while it may not have required, certainly permitted these conclusions:

Appellant's switching crews make and break up trains of cars and deliver and transfer them. One man of each crew is required to ride the rear car of the train when it is in motion. Depending upon the distances by which fixed structures along the track clear this car, he rides its top or side, and in some places both top and side clearances are so small that he must ride on the drawbar projecting from the end of the car. Sudden jerks and stops are common and they have on occasion thrown off switchmen. The duties of the rear switchman include lining switches into position after the train has passed and watching street and highway crossings to

protect the public when the train is backing up. In cases of emergency he must stop the train by turning an air valve located next to the drawbar, which he cannot readily or safely do if he is riding on the top or side of the car.

During some seasons of the year he is exposed to rain, sleet, snow and ice, which also cover the parts of the car to which he must cling to stay on it, thus adding to his difficulties.

Appellant's trains, when not equipped with cabooses, have no storage space for safety devices, flagging equipment, or for extra clothing, lunches and drinking water of the men; and they provide no space in which the men can perform their clerical duties.

The Commission found that by providing cabooses the appellant could eliminate the necessity for the rear switchmen to ride the tops, sides, or draw-bars of the rear cars; afford safe and ready access to the air valve; and provide space for storage and for clerical work. It found that it was essential to the health, safety, and comfort of the rear switchmen that the appellant provide cabooses on all of designated runs in so far as they were within the confines of the State, and made its order accordingly. The order was sustained by the Supreme Court of Illinois as "obviously promulgated to protect the lives and health of citizens of this State engaged in appellee's business within the State," and as not imposing an unlawful burden upon interstate commerce.[1] The case is here on appeal.[2]

All but an insignificant number of the cars in the trains on the specified runs move in interstate commerce, so that the order pertained to a matter clearly within the power of Congress to regulate interstate commerce.

Appellant claims that there had been Congressional occupation of the field by virtue of the Boiler Inspection Act,[3] the Safety Appliance Act,[4] and the Interstate Commerce Act.[5] It is not contended, nor do we understand, that these statutes, by them-

[1] 379 Ill. 403.

[2] § 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

[3] 45 U. S. C. §§ 22-34.

[4] 45 U. S. C. § 1 *et seq.*

[5] 49 U. S. C. § 1 *et seq.* Particular reliance is put upon paragraphs (10), (11), (13), (14), (15), (16), (17) and (21) of § 1, relating to the Commission's powers in respect to car service; and upon paragraph 2 of § 20(a), relating to its powers over the issuance of securities and the assumption of liabilities thereon. We have not been informed whether such issuance or assumption is needed to obtain the cabooses which the Illinois Commission has ordered to be used.

selves and unimplemented by any action of the Interstate Commerce Commission, lay down any requirement that cabooses shall or shall not be used on any of the runs in question. Nor is it contended that the Interstate Commerce Commission itself has sought to make any such requirement. At least in the absence of such action these Acts do not themselves preclude the state order, *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280; cf. *Welch Co.* v. *New Hampshire*, 306 U. S. 79, and it is unnecessary to consider on this occasion and without the participation of the Interstate Commerce Commission what may be the extent of its power under these Acts. If it should in the exercise of granted power determine whether appellant must provide cabooses, the State would be powerless to gainsay it. This and no more is the effect of *Pennsylvania Railroad Co.* v. *Public Service Commission*, 250 U. S. 566.

The Railway Labor Act,[6] also relied upon by appellant, remains for consideration and presents questions of a different order, not heretofore examined in any opinion of this Court.[7] The purpose of this Act is declared to be to provide "for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions"; and "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."[8] It places upon carriers and employees the duty of exerting every reasonable effort to settle these disputes by agreement, and prohibits the carrier from altering agreed rates of pay, rules or working conditions except in the manner provided by the agreement or by the Act itself.[9] Machinery is set up for the adjustment, mediation, and arbitration of disputes which the parties do not succeed in settling among themselves.[10] The First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving train and yard-service employees of carriers, which may be referred to it by agreement of both parties or by either party.[11] Its awards are made "final and binding" upon

[6] 45 U. S. C. § 151 *et seq.*

[7] Cf. Missouri Pacific R. Co. v. Norwood, 283 U. S. 249, 258.

[8] 45 U. S. C. § 151a.

[9] 45 U. S. C. § 152, paragraphs 1 and 7.

[10] 45 U. S. C. § 153 *et seq.*

[11] 45 U. S. C. § 153(h)(i); see also § 155.

both parties to the dispute[12] and the carrier may be required by the courts to comply, the Board's findings being, in a proceeding for such purpose, prima facie evidence of the facts therein stated.[13]

The order before us is the outgrowth of a dispute between the carrier and its employees. The contract between the appellant and the Brotherhood contains provision for cabooses for certain trains and services, but does not provide for those ordered by the Illinois Commission. We assume, without deciding, that the demand for additional caboose service and its refusal constitute a dispute about working conditions, and that the National Railroad Adjustment Board would have jurisdiction of it on petition of the employees or their representative and might have made an award such as the order in question or some modification of it. The question is whether the Railway Labor Act, so interpreted, occupied the field to the exclusion of the state action under review. We conclude that it does not, and for the following reasons:

The Railway Labor Act, like the National Labor Relations Act,[14] does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. *Pennsylvania R. R.* v. *Labor Board*, 261 U. S. 72, 84.

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for

[12] 45 U. S. C. § 153(m).
[13] 45 U. S. C. § 153(p).
[14] 29 U. S. C. § 151 *et seq.*

better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.

We must decide the question of state power in this case in the absence of any Act of Congress that conflicts with the order or may be said to occupy its field.

The order of the State Commission requires that cabooses be used on appellant's trains making runs of two different sorts. Runs of the first sort are made by trains which, although they begin and end and make their entire movements within the State, are made up almost entirely of cars moving in interstate commerce. Runs of the second sort are made by trains which move between points in East St. Louis, Illinois, and St. Louis, Missouri, and cross one or the other of two bridges spanning the Mississippi River and the state line. On its face the order requires only that cabooses be used within Illinois, and does not require that they be used in Missouri. Appellant contends, and we assume, however, that there do not exist, and that it is not reasonably practicable to install, facilities for taking on and dropping off cabooses at the points where the trains cross the state line; and that the practical consequence of the order is that if cabooses are to be used in Illinois on runs of the second sort they must also be used at least as far as the nearest switching point in Missouri.

As to both classes of runs, the effect of the order is in some measure to retard and increase the cost of movements in interstate commerce. This is not to say, however, that the order is necessarily invalid. In the absence of controlling federal legislation this Court has sustained a wide variety of state regulations of railroad

trains moving in interstate commerce having such effect.[15] The governing principles were recently stated in *Parker* v. *Brown* (No. 46, decided January 4, 1943), pp. 14-15.

We are of opinion that under these principles the order is valid as to runs of both sorts. It finds its origin in the local climatic conditions and in the hazards created by particular local physical structures, and it has rather obvious relation to the health and safety of local workmen. The record in the case does not afford a sure basis for calculating the costs to commerce resulting from the order against the costs to the safety and health of the workmen which it was intended to minimize, and there is evidence in the case that nearby railroads have seen fit in the absence of legal compulsion to provide cabooses in circumstances substantially similar to those upon which appellant relies to establish absence of state power.

If lack of facilities at the state line requires as a practical matter that in order to provide cabooses in Illinois appellant must also provide them for some distance in Missouri, that fact does not preclude Illinois from regulating the operation to the limits of its territory. *Missouri, R. Co.* v. *Kansas*, 216 U. S. 262; cf. *South Covington Ry.* v. *Covington*, 235 U. S. 537.[16]

The judgment of the court below is

Affirmed.

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[15] See cases cited in California v. Thompson, 313 U. S. 109, 113-114.

[16] This case involved a street-car line running between Covington, Kentucky, and Cincinnati, Ohio, over a bridge connecting the two cities. The City of Covington required that: (1) passengers must not ride on car platforms unless the platforms were equipped with suitable rails and barriers; (2) the cars must be kept clean, ventilated and fumigated; (3) the temperature of the air in the cars must never fall below a stated minimum; (4) in practical effect, that additional cars must be run in Cincinnati as well as in Covington in excess of the Cincinnati franchise rights and in such manner as to make probable the creation of serious impediments to other traffic in Cincinnati and conflict with Cincinnati regulations. The first two requirements were sustained. The third was struck down because the opening and closing of the car doors made compliance impossible; the fourth, because of the likelihood that serious burdens would be imposed upon interstate commerce by virtue of the impossibility of compliance with probable conflicting regulations. These factors have not been shown to exist in the present case.